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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MIKE ALLEN SCHOMISCH, Appellant.	2 CA-CR 2009-0096 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20074570

Honorable Deborah Bernini, Judge

AFFIRMED

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H O W A R D, Chief Judge.

¶1 Following a jury trial, appellant Mike Schomisch was convicted of manslaughter; two counts of aggravated assault with a deadly weapon or dangerous instrument; aggravated assault causing serious physical injury; aggravated driving under the influence while his driver license was suspended, revoked, or in violation of a restriction; aggravated driving with an alcohol concentration of .08 or more while his driver license was suspended, revoked, or in violation of a restriction; criminal damage; and endangerment. He was sentenced to concurrent and consecutive prison terms totaling nineteen years. On appeal, he argues the trial court erred by giving certain instructions and by failing to give others. For the reasons that follow, we affirm Schomisch's convictions and sentences.

Factual and Procedural Background

¶2 In reviewing the denial of a requested jury instruction, we view the evidence in the light most favorable to the requesting party. *See State v. King*, 225 Ariz. 87, ¶ 13, 235 P.3d 240, 243 (2010). Schomisch was driving when he struck a vehicle that had completed a U-turn in front of him. That vehicle flipped into opposing traffic where it landed on a third vehicle. Schomisch's passenger died. The other two vehicles involved in the accident suffered significant damage. At the hospital, Schomisch admitted to a doctor that he had been driving at least fifteen miles per hour over the speed limit. Other evidence showed he may have been going over eighty miles per hour and had not applied his brakes before impact. And, an hour and a half after the accident, his blood alcohol concentration was measured at .172. As a result, Schomisch was indicted

on nine felony counts. The jury found him guilty as stated above. He moved for a new trial, which the trial court denied. This appeal followed.

Proposed Jury Instructions

¶3 Schomisch argues the trial court abused its discretion and denied his constitutional right to present a defense by refusing to give jury instructions on superseding cause and statutes governing left turns and by denying his motion for a new trial on the same bases. We review a court's denial of a request for jury instructions for an abuse of discretion. *State v. Anderson*, 210 Ariz. 327, ¶ 60, 111 P.3d 369, 385 (2005). "A party is entitled to an instruction on any theory of the case reasonably supported by the evidence." *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995).

Superseding Cause

¶4 A superseding cause relieves a defendant of liability if it was unforeseeable and, in retrospect, appears abnormal or extraordinary. *State v. Bass*, 198 Ariz. 571, ¶¶ 11, 14, 12 P.3d 796, 800-01 (2000). An intervening act is not a superseding cause if it "'increases the foreseeable risk of a particular harm occurring through . . . a second actor.'" *State v. Slover*, 220 Ariz. 239, ¶ 11, 204 P.3d 1088, 1093 (App. 2009), *quoting Ontiveros v. Borak*, 136 Ariz. 500, 506, 667 P.2d 200, 206 (1983). And if a defendant's reckless conduct continues until the injury occurs, then any outside force contributing to the injury is a concurrent cause rather than an intervening force. *See Zelman v. Stauder*, 11 Ariz. App. 547, 550, 466 P.2d 766, 769 (1970). In *State v. Vandever*, 211 Ariz. 206, ¶¶ 2, 6, 119 P.3d 473, 474, 475 (App. 2005), the defendant requested a superseding-cause instruction when he had made an illegal left turn, arguing the driver of the vehicle with

which he collided may have been unforeseeably driving ten miles per hour over the speed limit. We upheld the trial court's refusal to give the instruction because, even if the other driver had been speeding, the collision was within the foreseeable scope of risk of the illegal left turn. *Vandever*, 211 Ariz. 206, ¶ 8, 119 P.3d at 475.

¶5 Here, although he contends the other driver made an illegal U-turn, Schomisch told a doctor he had been driving fifteen miles per hour over the speed limit, and he concedes his blood alcohol content was tested to be .172 an hour and a half after the accident. His speed would have resulted in him closing the distance to a driver turning in front of him much more quickly than he should have. In retrospect, the conduct of the other driver turning in front of Schomisch was neither abnormal nor extraordinary. *See Bass*, 198 Ariz. 571, ¶¶ 11, 14, 12 P.3d at 800-01. And a foreseeable risk of driving over the speed limit and driving while intoxicated is the inability to react and take evasive action if necessary in response to other traffic. *Cf. Rourk v. State*, 170 Ariz. 6, 12, 821 P.2d 273, 279 (App. 1991) ("An accident caused by an intoxicated driver who leaves a drinking party is not an extraordinary event."). Furthermore, Schomisch's reckless conduct continued up to the time of the accident, so the other driver's actions were at most a concurrent, not an "intervening," cause. *See Zelman*, 11 Ariz. App. at 550, 466 P.2d at 769. Therefore, the trial court did not abuse its discretion in denying Schomisch's request for a superseding-cause instruction or his motion for a new trial on the same ground.[1]

[1]Schomisch argues the trial court also erred in denying his motion for a new trial because it used the wrong standard to evaluate the evidence. But, "'[w]e are obliged to

¶6 Schomisch contends that *State v. Sucharew*, 205 Ariz. 16, 66 P.3d 59 (App. 2003), and *Bass*, 198 Ariz. 571, 12 P.3d 796, support his proposition that the superseding-cause instruction should have been given. However, neither of these cases examined whether the evidence supported a superseding-cause instruction. *See Sucharew*, 205 Ariz. 16, ¶¶ 28-33, 66 P.3d at 68-69; *Bass*, 198 Ariz. 571, ¶¶ 9-18, 12 P.3d at 800-02. Therefore, they are not relevant to our analysis of the issue presented here.

¶7 Schomisch further contends the lack of instruction on superseding cause violated his constitutional right to present a defense because "the right to argue evidence is meaningless when the jury is not required to consider it." But, he cites only *United States v. Hicks*, 748 F.2d 854, 857-58 (4th Cir. 1984), in which the court first found that the evidence supported the refused jury instruction before stating that the failure to give such an instruction may violate a defendant's Sixth Amendment right. Here, the evidence did not support giving a jury instruction on superseding cause, and Schomisch cites to no authority holding a defendant has a constitutional right to have a jury instruction given in the absence of supporting evidence. *Cf. Sucharew*, 205 Ariz. 16, ¶ 32, 66 P.3d at 68-69 (superseding cause not defense, but explanation of state's burden on causation).

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affirm the trial court's ruling if the result was legally correct for any reason.'" *State v. Chavez*, 225 Ariz. 442, ¶ 5, 239 P.3d 761, 762 (App. 2010), *quoting State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984). Because the evidence did not support the superseding-cause instruction, the court did not err in not providing the instruction to the jury and correctly denied Schomisch's motion for a new trial. *See* Ariz. R. Crim. P. 24.1(c)(4).

Left-turn instruction

¶8 Schomisch next asserts the evidence supported giving an instruction on making a proper U-turn and, in the absence of a statute on U-turns, an instruction based on the left-turn statute would have been appropriate. Jury instructions are intended "to inform the jury of the applicable law in understandable terms." *State v. Noriega*, 187 Ariz. 282, 284, 928 P.2d 706, 708 (App. 1996). A trial court has discretion to refuse to give an instruction not supported by the evidence. *See Vandever*, 211 Ariz. 206, ¶¶ 7-8, 119 P.3d at 475. And we will uphold the trial court's ruling if it is legally correct for any reason. *State v. Cañez*, 202 Ariz. 133, ¶ 51, 42 P.3d 564, 582 (2002).

¶9 The state argues we need not address this issue because Schomisch's request for the instruction was unclear and did not include a proposed written instruction. The appellant bears the burden of ensuring that the record on appeal includes the material to which he objects. *State v. Zuck*, 134 Ariz. 509, 512-13, 658 P.2d 162, 165-66 (1982); *see also State v. Lujan*, 124 Ariz. 365, 370, 604 P.2d 629, 634 (1979) (refusing to speculate on content of requested jury instruction when instruction not part of record). However, when the trial court expressly rules on a ground and the proposed written instruction is not necessary for full review, the argument should be addressed on appeal. *State v. Geeslin*, 223 Ariz. 553, ¶ 10, 225 P.3d 1129, 1131 (2010). Here, Schomisch requested an instruction on the statutes governing left turns, and the court denied the request, ruling the instruction would have been "irrelevant." The proposed written

instruction is not necessary for review in this case given the court's ruling in the context of the conversation.[2] *See id.*

¶10 The vehicle with which Schomisch collided had completed a U-turn, and Schomisch provides no authority that the statutes governing left turns also govern U-turns. Therefore, the proposed instruction was not supported by the evidence. *See Vandever*, 211 Ariz. 206, ¶¶ 7-8, 119 P.3d at 475. And instructing the jury on left-turn statutes when no left turn has occurred might confuse the jury. *See Noriega*, 187 Ariz. at 284, 928 P.2d at 708 (instructions "must not mislead the jury in any way and must give the jury an understanding of the issues").

¶11 Furthermore, Schomisch's reliance on *Shumway*, 137 Ariz. 585, 672 P.2d 929, is misplaced. In *Shumway*, our supreme court reviewed the trial court's decision to refuse an instruction on making a left turn when a driver had been making a left turn when the accident occurred. 137 Ariz. at 587, 672 P.2d at 931. Thus, that trial court refused an instruction stating the law applicable to the facts. Such is not the case here.

¶12 Because Schomisch offers nothing to connect the requested instruction on left turns to statutes or case law addressing U-turns, we conclude the trial court did not err by refusing to give an instruction on an inapplicable statute that might mislead the jury. Furthermore, as previously discussed, this proper refusal did not violate Schomisch's constitutional rights. Because the court did not err in refusing either jury

[2]To the extent, however, that Schomisch mentioned an instruction based on a generalized duty to execute the U-turn safely, the failure to propose a written instruction precludes our review. *See* Ariz. R. Crim. P. 21.1; Ariz. R. Civ. P. 51(a); *Lujan*, 124 Ariz. at 370, 604 P.2d at 634.

instruction, we reject Schomisch's allegation that the combination of those refusals was also error.

Jury Instruction on Presumption of Intoxication

¶13 Schomisch next argues the trial court's jury instruction on the presumption of intoxication could have misled the jury to believe the burden of proof on this element had shifted, thereby violating his rights to due process, because the language was not "clearly permissive." He concedes he did not object to this instruction below and that our review, therefore, is limited to prejudicial, fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Id.* ¶ 19, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). Fundamental error requires the defendant to establish that: (1) an error occurred; (2) the error was fundamental; and (3) the error resulted in prejudice. *See id.* ¶¶ 19-20. "[W]e review de novo whether jury instructions accurately state the law." *State v. Fierro*, 220 Ariz. 337, ¶ 4, 206 P.3d 786, 787 (App. 2008).

¶14 In relevant part, the instruction given here was:

> 3. If there was at that time 0.08 or more alcohol concentration in the Defendant's blood, breath or other bodily substance, *it may be presumed* that the Defendant was under the influence of intoxicating liquor.
>
> 4. Paragraphs 1, 2 or 3 of this subsection shall not be construed as limiting the introduction of any other competent evidence bearing upon the question of whether or not the Defendant was under the influence of intoxicating liquor.

(Emphasis added.) Schomisch asserts that, despite the use of the word "may," this instruction was not explicitly permissive. This instruction is similar to the one our supreme court reviewed in *State v. Childress*, 78 Ariz. 1, 274 P.2d 333 (1954).[3] In *Childress*, however, the jury instruction used "shall" rather than "may" in describing the nature of the presumption. The court concluded nevertheless that the instruction was appropriately permissive and did not violate the defendant's right to due process. *Id.* at 3-4, 6, 274 P.2d at 334, 336.

¶15 Furthermore, in a special action challenging an instruction substantially similar to that given here, this court concluded that the use of the word "may" was sufficient to indicate that the instruction was permissive and did not shift the burden of proof to the defendant. *State v. Klausner*, 194 Ariz. 169, ¶¶ 3, 9, 12, 978 P.2d 654, 655, 656-57 (App. 1998). Schomisch contends *Klausner* is distinguishable because it was a special action, the court stated it "assume[d] that trial courts routinely instruct the jury [the presumption is permissive]," and the court did not address the final sentence of the instruction regarding rebuttal evidence, which he contends renders the word "may"

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[3]The instruction reviewed in *Childress* stated, in relevant part:

> [I]f there was at that time 0.15 percent or more by weight of alcohol in the defendant's blood, *it shall be presumed* that the defendant was under the influence of intoxicating liquor.
>
> The statute further provides that the foregoing provisions shall not be construed as limiting the introduction of any other competent evidence bearing upon the question of whether or not the defendant was under the influence of intoxicating liquor.

78 Ariz. at 3, 274 P.2d at 334 (emphasis added).

impermissive. But even if those differences were sufficient to distinguish the case, *Childress* still would be controlling, and the final sentence Schomisch challenges here also was present in the instruction reviewed by the *Childress* court. *See* 78 Ariz. at 3, 274 P.2d at 334.

¶16 Similarly, we are unpersuaded by Schomisch's contention that the language of the State Bar of Arizona's Revised Arizona Jury Instruction (Criminal) 28.1381(G) (2008) demonstrates that the language of the instruction provided in his trial was not a permissive presumption. The trial court could have chosen to include the language in this instruction which explicitly informs the jury the presumption is permissive, but *Childress* makes it clear such language is not required. Consequently, we find no error. Moreover, even if the jury had been given an instruction that specifically addressed the permissiveness of the presumption, we cannot conclude on these facts that it would have come to a different result. Thus, Schomisch was not prejudiced by the instruction as given.

¶17 Alternatively, Schomisch argues the trial court erred in providing the instruction because no "relation-back" evidence was presented to connect his later intoxication to the time of driving.[4] As already noted and as he concedes, he did not object to this instruction below and our review is limited to prejudicial, fundamental error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. We review for an abuse

[4]Schomisch states the presumption permitted the jury to find he was intoxicated at the time of driving. But the language he challenges has been specifically found to apply at the time of the test—the jury was permitted to presume that Schomisch was intoxicated at the time his blood was drawn. *See Klausner*, 194 Ariz. 169, ¶ 7, 978 P.2d at 656.

of discretion the trial court's decision to give a particular jury instruction. *State v. Johnson*, 205 Ariz. 413, ¶ 10, 72 P.3d 343, 347 (App. 2003).

¶18 The thrust of Schomisch's argument is that *Desmond v. Superior Court*, 161 Ariz. 522, 779 P.2d 1261 (1989), is still good law on this point and that the subsequent cases decided by this court reaching a contrary conclusion are incorrect. But we are not convinced by his attempt to dismiss the cases we previously have decided as incorrect with the argument that *Desmond* was based on an analysis of the science rather than the statute.[5] Therefore, it was not error for the trial court to give the instruction even in the absence of evidence relating the intoxication back to the time of driving. *See State v. Gallow*, 185 Ariz. 219, 221, 914 P.2d 1311, 1313 (App. 1995) ("*Desmond* is no longer applicable given the amendments to the DUI statutes. . . . Accordingly, we conclude that the trial court did not err in giving the presumption instruction without relation-back testimony."); *see also Klausner*, 194 Ariz. 169, ¶¶ 4, 16-21, 978 P.2d at 655, 658-59 (state had no relation-back evidence; *Desmond* not controlling in light of amendment to statute); *State v. Guerra*, 191 Ariz. 511, ¶¶ 10, 13, 958 P.2d 452, 455-56 (App. 1998) (*Desmond* not controlling; relation-back evidence not required). We further note that, in spite of the presumption instruction, the state still was required to prove—and the jury still needed to find—that Schomisch was "impaired to the slightest degree" at the time of

[5]We observe that Schomisch cites to a discussion of the science in *Desmond* which relates to whether the defendant's blood alcohol concentration (BAC) was tested more than once to demonstrate whether it was rising or falling after the time of driving. *See Desmond*, 161 Ariz. at 527, 779 P.2d at 1266. Schomisch's blood was drawn and tested three times. The last blood draw was four hours after the time of driving, and the BAC was measured to be .118. These draws demonstrate Schomisch's BAC was falling and, therefore, most likely would have been higher at the time of driving.

driving. A.R.S. § 28-1381(A)(1); *see also Gallow*, 185 Ariz. at 221, 914 P.2d at 1313. Consequently, we find no error in the trial court's instruction on presumption of intoxication as given.

Conclusion

¶19 In light of the foregoing, we affirm Schomisch's convictions and sentences.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge